Nos. 82-1312, 82-1345, 82-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

BRIEF IN OPPOSITION OF RESPONDENT, AMERICAN PUBLIC POWER ASSOCIATION, TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Upon expiration of a license for a hydroelectric project, the original licensee and new applicants for a license may compete for issuance of a new license. The opinions of the Federal Energy Regulatory Commission and Court of Appeals require that the Commission evaluate numerous factors in deciding which applicant is entitled to receive a new license. The question presented is: If evaluation of all public interest and statutory factors results in a finding by the Federal Energy Regulatory Commission that the competing applicants' plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region," whether the preference right of states and municipalities contained in Section 7(a) of the Federal Power Act entitles the preference entity to the new license in a contest with the original licensee?

PARTIES TO THE PROCEEDINGS BELOW

Respondent American Public Power Association is a national service organization composed of more than 1,750 municipal and state-owned electric utilities in 49 states. It was an intervenor in both the Court of Appeals and proceedings before the Federal Energy Regulatory Commission in this matter. Its members include municipalities, state power authorities and districts, and other publicly-owned utilities that generate, transmit, and distribute electricity. A list of the parties in the Court of Appeals is contained in Appendix 5 of the Petition for a Writ of Certiorari filed by Alabama Power Company, *et al.*

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Respondent American Public Power Association hereby submits its brief in opposition to the petitions for writs of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 685 F.2d 1311 (11th Cir. 1982) and is set forth in the Appendix of Petitioner, Pacific Gas and Electric Company ("Pet. App.") at 1(a) *et seq.* Opinion and Order No. 88 ("Opinion No. 88") of the Federal Energy Regulatory Commission ("FERC" or "Commission") and its Order No. 88-A Denying Rehearing ("Opinion No. 88A") are reported at 11 FERC (CCH) ¶ 61,337 and 12 FERC (CCH) ¶ 61,179, and are set forth at Pet. App. 14a *et seq.* and 82a *et seq.*

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1982, Pet. App. at 84a. The Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on November 12, 1982, Pet. App. at 85a. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Part I of the Federal Power Act (the "Act"), formerly known as the Federal Water Power Act of 1920, 16 U.S.C. § 792 *et seq.* Sections 7, 14, 15, and 22 of the Act are set forth at Pet. App. 88a *et seq.*

STATEMENT OF THE CASE

The Federal Power Act authorizes the Federal Energy Regulatory Commission, successor to the Federal Power Commission, to issue licenses for hydroelectric projects located on navigable waters. Section 6 of the Act (16 U.S.C. § 799) prohibits the issuance of licenses in perpetuity. Instead, that section provides that licenses "shall be issued for a period not exceeding fifty years."

During this fifty-year period, the licensee has the opportunity to recover its costs and earn a return on its investment from the project's operation. Upon expiration of the license, the federal government retains the right to take over the project for the federal government's own use or to issue a new license, either to the original licensee or a new operator. Sections 14 and 15, 16 U.S.C. §§ 807,808.

In issuing licenses for previously licensed projects under Section 15, the Commission must apply the requirements of Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a). Section 7(a) provides that the Commission:

> "shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . ."

If a party other than the original licensee obtains a new license, the new operator must compensate the original licensee for its "net investment" plus "severance damages." Section 3(13), 16 U.S.C. § 796(13) ("net investment"); Section 14, 16 U.S.C. § 807 ("severance damages").

A. Proceedings Before the Commission

In the mid-1970's, the City of Bountiful, Utah and Utah Power & Light Company ("UP&L") filed competing applications for a license to operate the Weber River hydroelectric project. This project was then being operated by UP&L, pursuant to year-to-year authorizations, after UP&L's fifty-year license expired in 1970. In 1978, Bountiful asked the Commission to issue a declaratory order clarifying the application of Section 7(a) of the Act in these circumstances.

After consolidating Bountiful's request with a similar petition by the City of Santa Clara, California, the Commission

initiated a proceeding to address the question.[1] The Commission limited its inquiry to the purely legal issue of statutory construction.

> "[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920." Pet. App. at 23a.

Thereafter, following extensive briefing and oral argument, the Commission unanimously issued Opinion No. 88 declaring that:

> "the preference of Section 7(a) of the [Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources." Pet. App. at 24a.

The Commission's careful and exhaustive decision examined the language of Section 7(a), and reviewed the voluminous legislative history of the Act. It found that the preference of Section 7(a) operates only after the Commission determines that the plans of the state or municipality are, in the language of Section 7(a):

> "equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . ." Pet. App. at 24a.

In short, the Commission declared that there is a preference which operates as a "tie-breaker rule." Pet. App. at 77a.

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[1] The City of Santa Clara and Pacific Gas and Electric Company had pending applications for a new license for PG&E's Mokelumne River Project. Pet. App. at 21a.

The Commission eschewed any attempt to provide a "definitive statement . . . as to what showings should and must be made by the applicants in seeking to demonstrate how their plans compare." Pet. App. at 78a. Rather, it offered general guidance on the factors to be used to determine whether competing proposals are "equally well adapted."

Significantly, the Commission rejected as premature arguments by private utilities (identical to those now being presented to this Court by petitioners) concerning the impact of license transfers. The Commission concluded that any alleged disruptive effect would be considered in the light of facts and circumstances of each particular case, in determining whether the applications were "equally well adapted." Pet. App. at 81a.

B. Proceedings in the Court of Appeals

After the Commission denied rehearing (Pet. App. at 82a-83a), petitioners appealed to the United States Court of Appeals for the Fifth Circuit. Following creation of the Eleventh Circuit, a panel of that Court unanimously affirmed the Commission's decisions.[2]

The Court of Appeals agreed that petitioners' request for declaratory relief raised "a purely legal question" regarding the meaning of Section 7 of the Act. Pet. App. at 1a. The Court found that Section 7 provided a preference for states and municipalities in three situations: in issuing preliminary permits; in issuing licenses where no permit has been issued; and in issuing licenses to new licensees under Section 15. As analyzed by the Court of Appeals, the instant case involved only the third situation, specifically whether the statutory preference applied to all contests involving states or municipalities, or whether its application was "limited" to contests in which the original licensee was not among the applicants for a new license. Pet. App. at 8a-9a.

Although the Court concluded that the language of Section 7 was susceptible to more than one interpretation, it noted that application of a "limited preference" for states or municipalities

[2] Appeals brought in the D.C. and Tenth Circuits were consolidated with those in the Fifth Circuit.

"would cause administration of the Act by the Commission to be confusing and sporadic" and would lead "to an absurd result." Pet. App. at 10a.

> "Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and municipalities realistically would have no preference at all because a preference to a losing project is worthless." *Id.*

Turning to the legislative history of the Act, the Court examined the writings of Oscar Charles Merrill [3] and Gifford Pinchot [4] as well as testimony before the House Special Committee by private industry representatives and the Secretary of the Interior. On the basis of this material, as well as the Commission's interpretation of the statute, the Court concluded that the state and municipal preference of Section 7(a) "applies to all competitive relicensing cases, not just those where the original licensee is not an applicant." The Court of Appeals also upheld the Commission's decision that "the preference applies in a tie-breaker situation." Pet. App. at 13a.

Following denial of a petition for rehearing and suggestion for rehearing *en banc*, petitioners sought certiorari in this case.

C. Subsequent Developments

While the instant petitions were pending in this Court, "a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A [in 1980], expressed their disagreement with the Commission's earlier position in those orders." Brief of the Solicitor General for the

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[3] O.C. Merrill was Chief Engineer of the Forest Service when the Act was being considered by Congress. "His role in developing the [Act] is unique in that he became a principal advisor on water power to Congress, if not the principal advisor, as well to the President [Wilson] and his Cabinet." Pet. App. at 31, n. 18. This Court has previously cited Merrill's testimony before the House Committee on Water Power as representing the views of the Secretaries of Agriculture, the Interior, and War. United States v. Public Utilities Comm'n of California, 345 U.S. 295, 305 n. 10 (1053).

[4] Gifford Pinchot served as Secretary of the Interior in the Roosevelt and Taft Administrations. As President of the National Conservation Association, he was instrumental in drafting Section 7. Pet. App. at 12a.

Federal Energy Regulatory Commission at 8 (hereinafter Sol. Gen. Br.). Accordingly, the Commission voted to request that the Solicitor General recommend that this Court grant the petitions for certiorari, for the purpose of vacating the judgment of the Court of Appeals and remanding the case to that court "with instructions to remand to the Commission for further consideration." *Id.*

On May 11, 1983, the Solicitor General filed his brief in this Court. Only partially acceding to the Commission's request, the Solicitor General has asked this Court to grant the instant petitions and remand the case to the Court of Appeals to enable that court to "reconsider the case and reevaluate its own position." Sol. Gen. Br. at 9. The Solicitor General cited no precedent for this disposition and made no claim that the Commission wished to present evidence or arguments that had not previously been considered by the Court of Appeals when it unanimously affirmed the Commission's decision and denied rehearing *en banc*. Rather, the only basis for this extraordinary request was that, following the appointment of four new Commissioners, the situation has become "especially delicate" because "a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt a contrary position." *Id.* In effect, the Solicitor General has conceded that the Commission's new majority seeks a remand not to "reconsider" its decision, but to "overrule Opinion Nos. 88 and 88A" despite not having participated in those proceedings.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Involve an Automatic Reallocation of the Nation's Hydroelectric Resources

Petitioners contend that, upon expiration of a hydroelectric project's license, a preference entity will almost automatically "take control at relicensing of the nation's privately operated hydroelectric projects, without demonstrating that the public interest would thereby be better served." Petition of Pacific Gas and Electric Company at 10.

This is a misleading argument. The preference applicant is not guaranteed award of a license solely because of its status as

a state or municipality. In Opinion No. 88, the Commission did not adjudicate competing license applications and did not apply the standard of Section 7(a). Rather, the Commission granted declaratory relief, holding that the municipal preference would apply in a contest involving an original license, *but only if* the Commission found that the plans of the state or municipal applicant are "equally well adapted" to those of other competitors.

Both the Commission and Court of Appeals recognized that the preference was a "tie-breaker" to be used in proceedings when competing plans were otherwise "equally well adapted." The petitioners ignore these rulings, and suggest a far broader application of Opinion No. 88 than intended by the Commission.

The Commission held that in deciding which applicant would receive a license, it would adopt the characterization of counsel for Petitioner Utah Power and Light and evaluate "the public interest in its broadest sense." *Id.* at 78a-79a. It observed that regardless of which applicant is selected, a project must be "best adapted" to beneficial public uses. This evaluation requires consideration not only of physical and technical factors but also, according to the Commission, such issues "as economic costs and benefits, [and] the distribution of the benefits of hydropower and similar pertinent potential impacts." *Id.*

The Commission directed that the processing and consideration of pending relicensing cases, involving an applicant asserting the statutory preference against a competing applicant, should go forward in light of Opinion No. 88; the Commission would thereafter make its determinations based upon the record made in connection with each particular case. *Id.* at 81a.

The Commission's decision to conduct an evaluation of many factors in considering competing applications nullifies petitioners' contentions that hydroelectric projects will be almost automatically licensed to state or municipal utilities. Its decision merely establishes general guidelines that will be

applied in a concrete setting only in contests between municipal and private applicants which cannot otherwise be resolved.[5] In short, the decisions below may prove to have a more limited impact than that asserted by the petitioners and do not merit the exercise of this Court's certiorari jurisdiction.

B. The Court of Appeals Correctly Construed Section 7(a) of the Act

1. The Meaning of Section 7(a)

Section 7(a) of the Act authorizes the Commission to give a relicensing preference to states and municipalities "in issuing licenses to new licensees under Section 15 . . . ." The Commission held that this statutory preference applies in all cases where the agency must decide whether to issue a new license. The Court of Appeals affirmed that decision, holding that the Commission's construction of the statute was consistent with its "language structure, scheme, and available legislative history." Pet. App. at 9a. The Court of Appeals also rejected petitioners' claim for a more "limited" preference, finding that such an interpretation would lead to an "absurd" result.

The language of Section 7 establishes that it was designed to govern the decisional process whenever the Commission must evaluate competing applications for a "new license." It contains no exception for contests involving an application by the original licensee.

The petitioners would read Section 7(a) as though it limited the preference to contests "only against applicants seeking the right to operate an existing project for the first time." This condition is absent from the statute, and petitioners have failed to cite any portion of the voluminous legislative history showing that Congress inadvertently excluded it. The

[5] Petitioner Pacific Gas and Electric claims there is a "risk" that the municipal preference will be used as more than a "tie-breaker." This is simply not supported in the record and must be dismissed as speculation. The passage from Judge Mikva's dissent in City of Dothan v. FERC, 684 F.2d 159, 166 (D.C. Cir. 1982), cited by PG&E, carefully avoided discussion of the application of the tie-breaker in contests involving municipalities.

language of Section 7(a) simply contains no support for the so-called "limited" preference advocated by petitioners.[6]

2. The Legislative History of Section 7(a)

(a) Initial Congressional Action

As the Commission demonstrated in its extensive analysis of the Act, this legislation was a Progressive Era measure, designed to assure that the Nation's water power resources would revert to the public, and "to place a time limit on a private lessee's or licensee's use of the resources." Pet. App. at 30a.

The bill which led to the passage of the Federal Water Power Act was introduced in the 65th Congress in 1918 as H.R. 8716. It was a Wilson Administration measure prepared under the direction of the Secretaries of Agriculture, Interior and War. In a memorandum written to the President on October 31, 1917, Mr. O.C. Merrill, whom all parties concede was a principal draftsman of H.R. 8716, explained the objectives of what eventually became Section 7(a).

> "Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition *the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental*

[6] Petitioners rely heavily on Section 15(a) of the Act which distinguishes between "new licenses [issued] to the original licensee" and "new licenses . . . [issued] to a new licensee." Nothing in Section 15(a) indicates that it was designed to limit the preference of Section 7(a). Moreover, as the Commission held, Pet. App. at 59a-62a, this distinction cannot be carried over into Section 7(a) "because the contexts of usage are different." Section 15(a) makes this distinction solely to establish that only a successor licensee must compensate an original licensee for its net investment, plus severance damages, "as the United States is required to do" if it were to undertake operation of the project. Indeed, the only cross-reference in Section 15(a) is to Section 14, which sets forth the obligations of the United States in the event of federal operations. *See also* Sol. Gen. Br. at 5-6.

> *purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee*—to secure renewal under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for *future public ownership* and operation if the experience of the next fifty years shall have established the wisdom of such a policy." Pet. App. at 32a-33a (emphasis supplied).

After H.R. 8716 was introduced, Merrill stated to the House Special Water Power Committee that Section 7 would assure the Commission "the discretion . . . to prefer any municipality over a private applicant." Hearings on H.R. 8716 Before the House Committee on Water Power, 65th Cong., 2d Sess. (1918) at 55.[7]

This was also the understanding of others involved in consideration of H.R. 8716. For example, the following colloquy, quoted by the Court of Appeals (Pet. App. at 11a), took place between Congressman E.S. Candler and a witness for private industry:

> "Mr. Candler. Now then you do understand that under this bill the Government of course has the first right to retake the property?

"Mr. Hall. Yes, sir.

"Mr. Candler. Then do you further understand it that a provision of the bill further is that some of the licensees might be preferred over the first licensee?

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[7] As initially introduced, Section 7(a) would have provided:

"That in issuing licenses hereunder, the commission may in its discretion give preference to application for licenses by States and Municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region . . . ." Pet. App. at 34a.

"Mr. Hall. The bill provides that; yes, sir. They can take it away and give it to somebody else.

"Mr. Candler. Then the original licensee would have only the third opportunity to count on his lease.

"Mr. Hall. That is the way I understand it." Pet. App. at 35a.

The Secretary of the Interior expressed a similar view. House Hearings, *supra* at 464.[8]

H.R. 8716 passed the House after various changes which extended the preference to "preliminary permits" and made it mandatory rather than discretionary.[9] The Senate passed its own bill, which provided a more limited preference. *See* 56 Cong. Rec. 225-26 (1917) (Schields bill). The Conference accepted the House version, with "clarifying" amendments.[10] Pet. App. at 39a. Congress took no final action that session.

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[8] Petitioners rely on a different colloquy between the Chairman of the Special Committee and the Secretary of the Interior, in which the Chairman opined that states and municipalities would not be preferred over an original licensee. Petition of Pacific Gas and Electric at 8, *citing* Pet. App. 36a. Yet a review of that testimony, Housing Hearings at 453-54, *plus* earlier testimony, House Hearings at 380-81, reveals that the Chairman and the Secretary were discussing an *automatic* preference, as opposed to the "tie-breaker" which is contained in Section 7(a).

[9] As passed by the House on September 5, 1918, Section 7(a) provided:

"That in issuing *preliminary permits or* licenses hereunder the commission [may in its discretion] *shall* give preference to applications *therefor* by States and municipalities provided the plans for the same are deemed by the commission [to be best] adapted to conserve and utilize in the public interest the navigation and water resources of the region . . . ." (Additions italicized, deletions bracketed.) Pet. App. at 38a.

[10] As reported by the Conference, Section 7(a) provided:

"That in issuing preliminary permits hereunder or licenses [hereunder] "*where no preliminary permit has been issued* the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission *equally well* adapted to conserve and utilize in the public interest and navigation and water resources of the region . . . ." (Additions italicized, deletions bracketed). Pet. App. at 39a.

(b) Final Congressional Action

When the 66th Congress convened, a bill identical to that reported by the Conference was introduced as H.R. 3184. On June 24, 1919, H.R. 3184 was reported without change to the House floor. On July 1, 1919, this bill was approved by the House with minor amendments not affecting the municipal preference. *See* Pet. App. at 40a-41a.

On June 25, 1919, while H.R. 3184 was pending in the Senate, Gifford Pinchot, President of the National Conservation Association, and a strong supporter of public power, wrote to the Chairman of the Senate Committee, urging a number of changes. He stated, with respect to Section 7 that:

> "The obvious intention of Sec. 7 is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word 'issued' in line 11, page 12, of your bill, the words 'and in issuing licenses to new licensees under Sec. 15 hereof,' or words of like import." Pet. App. at 42a-43a.

In September 1919, that Committee reported the bill with Section 7 changed to include Pinchot's language (Pet. App. at 43a-45a):

> "Sec. 7. That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under Section 15 hereof* the Commission shall give preference to applications therefor by States and municipalities . . . ." (Emphasis added to Pinchot's language.)[11]

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[11] Petitioner PG&E relies heavily on the Senate Commerce Committee changes to support its view that Section 7(a) provides only a "limited preference" for states and municipalities. As demonstrated above, however, these changes were designed to clarify, rather than restrict, the preference and were proposed by an observer hardly sympathetic to private power interests. *See* Pinchot, The Long Struggle for Effective Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1945).

H.R. 3184, embodying the Pinchot suggestion, passed the Senate on January 15, 1920. Pet. App. at 45a. The House disagreed with other Senate amendments and a conference was convened. O.C. Merrill then prepared a memorandum on the Senate amendments. He concluded that the amended version adding the phrase "in issuing licenses to new licensees" was a "desirable" addition which served to "strengthen" the provisions of Section 7. Pet. App. 45a.

Senate amendments to Section 7 were accepted by the House-Senate Conference Committee in April 1920. Merrill then prepared a "Memorandum on Features of Public Interest in Water Power Bill H.R. 3184" for Representative Lee, a floor manager for the Conference Report. This Merrill memorandum states:

> "In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring of properties of other licensees at the end of a license period." Pet. App. at 45a.

On May 4, 1920, Congressman Lee repeated Merrill's language to explain that the municipal preference applies "at the end of a license period." 59 Cong. Rec. 6527 (May 14, 1920). The Conference Report was approved by the House the same day. *Id.*

The Conference Report was approved by the Senate on May 28, 1920, and H.R. 3184 was transmitted to President Wilson on May 31, 1920. *Id.* Another Merrill memorandum, dated June 8 or 9, 1920, advised the President,

> "For development by agencies other than the United States preference is given to States and municipalities. A *similar preference is given for the acquisition of the properties of other licensees at the end of the license period.*" *Id.* (emphasis supplied).

President Wilson signed H.R. 3184 on June 10, 1920.

This history leaves little doubt that the purpose of Section 7(a) was to provide a preference to states and municipalities in any relicensing contest, including one with the original applicant. The legislation was drafted to embody to objectives of the 1917 Merrill memorandum and was shepherded through Congress with this understanding. Indeed, less than two years after passage of the Act, Judge Clayton, author of the 1914 Antitrust Act and a member of Congress until 1914, explained in dicta the preference of Section 7(a).

> "In further regard to the scope of the [Act], the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that *if the United States does not at the end of such period take over the project the state or municipality under section 7 is given the preferential right over the original lessee to a renewal of the license." Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922) (emphasis supplied).[12]

C. The Extraordinary Request of the Solicitor General for a Remand to the Eleventh Circuit Should be Denied

In his May 11 brief, the Solicitor General requests that this Court exercise certiorari jurisdiction to remand this case to the Eleventh Circuit. The Solicitor General makes no claim that the Court of Appeals decision was wrong or that that court failed to consider the extensive arguments made below by the Commission and all other parties.[13] Rather, the Solicitor's position is a

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[12] Petitioners object to reliance by the Commission and Court below on "history" beyond that in the Congressional Record and committee materials. This Court has held, however, that it may consider "everything from which aid can be derived" in construing a statute, a precept of particular significance here. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall C.J.).

[13] It is difficult to understand the purpose of a remand to the Court of Appeals. The case was fully briefed and argued below, with a panel of the Eleventh Circuit holding that the result of the Commission's new interpretation of Section 7(a) would be "absurd." A motion for reconsideration and a suggestion for rehearing *en banc* were also denied without dissent.

response to a request by the Commission's new members for a further remand to that body, so that these Commissioners may now reverse the position of their predecessors and hold that Section 7(a) did not mean what Opinions 88 and 88A said it did.

To conclude that this situation is extraordinary is a gross understatement. The Solicitor General has cited no precedent for this request. It surely is not customary for a regulatory commission, after successfully advocating a contrary view in the Court of Appeals, to ask this Court to permit it to change its construction of a statute, solely because the Commission's membership has changed.

There are obviously appropriate occasions to vacate the judgment of a lower court to give that court an opportunity to reconsider a case in light of changed circumstances. For example, this Court routinely vacates and remands cases for reconsideration in light of its intervening decisions. This Court also has vacated and remanded decisions where action by Congress has changed the nature of the controversy. *Western Oil and Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (vacation following amendments to the Outer Continental Shelf Lands Act). Similarly, we would be hesitant to criticize a reasonable request by an agency to consider new evidence or to re-evaluate a discretionary determination, if such a request did not prejudice any other party.

This case, however, presents a far different situation. The Solicitor General has candidly represented that the Commission's request was not made to permit an open-minded or fresh look at the controversy, but "to overrule Opinion Nos. 88 and 88A and adopt a contrary position," without benefit of participation in the earlier proceedings or a first-hand opportunity to hear the parties. Although the Commission would presumably hold some form of proceeding on remand, the Solicitor General's representation leaves no doubt about its outcome.

Perhaps most significantly, adoption of the Solicitor General's unfortunate suggestion will have significance far beyond this case. A regulatory commission is, of course, free to make

reasoned changes in its policies. But "there is an equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." K. Davis, 1980 Supplement to Administrative Law Treatise, § 17.07, at 111, *quoting Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977). *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 199 (1947) (decision based upon "thorough reexamination of the problem in light of the purpose and standards of the [Act]"). That test has not been met here. Indeed, if the Solicitor General's request were granted under these circumstances, then presumably any regulatory commission, dissatisfied with previous rulings on controversial subjects, could justify seeking remand of pending cases solely because a new majority was able to garner the votes to make the request.

Finally, if this Court concludes, contrary to the views of the private respondents, that this case merits certiorari, respondent American Public Power Association respectfully suggests that the appropriate course would be to set the case for oral argument on the merits.

The positions of the petitioners and the Solicitor General are premised on the view that this is a case of national importance, with significance beyond the interests of these parties. If this view is correct, then the *most* unsatisfactory result would be to introduce indefinite uncertainty and confusion in this area of the law. That uncertainty would undoubtedly be prolonged if this case were remanded to the Court of Appeals, with a subsequent remand to the Commission, followed by inevitable requests for further review by the Court of Appeals and this Court. Indeed, if this experience is any guide, it is not inconceivable that future Commissioners would seek to reverse a decision of the current commission, with the process continuing *ad infinitum*.[14]

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[14] For individual litigants, this situation could become especially grave. A FERC administrative law judge has already applied Opinion No. 88 in one relicensing contest. Pacific Power & Light Co., et al. Project No. 935-000 (April 28, 1983). Presumably, if this case were remanded to the Commission, all such proceedings would be stayed pending the Commission's new decision.

CONCLUSION

The claims of the petitioners rest upon a misreading of the opinions below and an incorrect understanding of the practical implications of these opinions. The Solicitor General's brief does not refute this analysis, nor does it provide any reasoned basis for a further remand to the Eleventh Circuit.

These petitions for certiorari should be denied, or should be granted only as an alternative to the Solicitor General request for a remand to the Court of Appeals.

Respectfully submitted,

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